

**THE STATE**

**versus**

**ARLINGTON MUSENDO**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 9 DECEMBER 2004

Criminal Review

**NDOU J:** The accused is aged 23. He resides with his father, the complainant in this matter. The accused stole a size “10” spanner, a stove switch, tape measure, pair of overalls and four screw drivers from his place of abode, the property of his father. The value of the stolen property was put at \$385 000,00. Property valued at \$25 000,00 was recovered. He was at the time unemployed, unmarried, inpecunious and with no assets. He was wholly dependent on his father for shelter and food. His father was given an opportunity to comment on the accused’s conduct. He, with some obvious measure of bitterness said:-

“He (the accused) has been stealing from me. He once stole cables, welding machines. His mother died. I live with accused only. I have forgiven him for long but he becomes violent to me. I request he be sent to prison.”

The learned trial magistrate, Western Commonage, was obviously moved by these words of a disappointed father and did exactly as suggested by him. She sentenced the accused to undergo 30 months imprisonment with half thereof suspended on conditions of good behaviour. Ungrateful as the accused may have been towards his father, the trial should have given him an opportunity to examine his father on the damning utterances. Some of them related to previous thefts for which

the accused was not prosecuted. The acceptance of such utterances without affording the accused an opportunity to either challenge or confirm them is highly prejudicial. In *casu*, these utterances were acceptable as indicative of the accused being “highly ungrateful” to his father. This is evinced by the following comment in the trial magistrate’s reasons for sentence – “He (father) said you have been stealing from him for long and when he remonstrates (sic) you you become violent. It is clear you are a problem to your parent ...”

In such circumstances, the accused should have, at the very least, been given an opportunity to examine his father in terms of the demands of justice – *audi alteram partem* principle. Such aggravating evidence should have been given under oath. It is necessary, where witnesses give either mitigatory or aggravating evidence to be cross-examined by the opposing party – *R v Shuba* 1958(3) SA 844; *S v Furisayi* 1981 ZLR 56(A) and *S v Ndebele* 1988(2) ZLR 249(H). This was not done in this case and this constitutes a misdirection. Further, this is a case where the option of community service should have been seriously considered. Most of the relevant factors for considering community service sentence are apparent – *S v Mpofo* HB-73-03 and *S v Mutonho* HH-105-04. The accused has served around three months imprisonment and as such the option is now rendered inappropriate.

In view of the above mis-direction I am at large as far as sentence is concerned. Accordingly, the conviction is confirmed but the sentence by the trial court is set aside and in its place the following is substituted:

“12 months imprisonment of which 6 months imprisonment is suspended for 3 years on condition the accused in that period does not commit any offence involving theft or dishonesty and for which he is convicted and sentenced to imprisonment without the option of a fine.”

HB 151/04

Ndou J .....

Cheda J ..... I agree